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Mas Anita bt Abdullah v Lew Wai Koung

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2887–12 OF 2012
MOHD HISHAMUDIN, ABDUL AZIZ AND MOHAMAD ARIFF JJCA
27 MAY 2014

B

Land Law — Vacant possession — Demised premises — Whether order for vacant possession could be enforced by re-entry onto property without taking out writ of possession — Whether mandatory for order to be enforced by way of writ of possession — Section 7(1) of the Specific Relief Act 1950 read with O 45 r 3(1)(a) and 3(2) of the Rules of Court 2012 ('the ROC') — Whether phrase 'action in the Court' found in s 234(2) of the National Land Code did not exempt person who had obtained order for vacant possession from complying with O 45 r 3(1)(a) and 3(2) of the ROC

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The respondent had obtained default judgment in the sessions court against the appellant for arrears of rental owing in respect of a demised house together with an order for vacant possession of the property. Instead of enforcing the order for vacant possession by taking out a writ of possession as required by s 7(1) of the Specific Relief Act 1950 ('the SRA') read with O 45 r 3(1)(a) and 3(2) of the Rules of Court 2012 ('the ROC'), the respondent, purporting to act pursuant to s 234(2) of the National Land Code ('the NLC'), re-entered upon the premises without a writ of possession. The appellant filed an action in the High Court to challenge the legality of the respondent's action and prayed that if the court found in her favour, the respondent should immediately return all her moveable properties and documents the respondent had taken from the house. The respondent filed an O 14A application under the ROC requesting the court to summarily dispose of the action by deciding on point of law whether the respondent's manner of re taking possession was lawful. The High Court ruled in favour of the respondent and dismissed the appellant's claim resulting in the instant appeal. The court interpreted the words in O 45 r 3(1) of the ROC which stated that 'a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means; (a) a writ of possession; (b) in a case in which r 5 applies, an order of committal', to mean the respondent could elect whether to enforce the order for possession under O 45 r 3 of the ROC or by other means. The court held the respondent's election to proceed under s 234(2) of the NLC by re-entering upon the premises was not wrong as O 45 r 3 of the ROC did not make it mandatory for the respondent to enforce the order by way of a writ of possession.

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Held, allowing the appeal with costs:

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(1) Since the respondent had obtained an order for vacant possession, he was 'a person entitled to the possession of specific immovable property' under s 7(1) of the SLA and it was mandatory for him to 'recover it in the manner prescribed by the law relating to civil procedure' as provided under that same section. The 'law relating to civil procedure' was O 45 r 3(1)(a) and 3(2) of the ROC (see paras 19, 20 & 23).

(2) Section 234(2) of the NLC provided that the forfeiture of any lease, sub lease or tenancy might be enforced either 'by re-entry onto the land' or 'by action in the Court'. In the present case, the forfeiture by the respondent was enforced by way of 'an action in the Court' since he obtained an order for vacant possession from the sessions court. Obtaining that order was the first step towards enforcing his right to possession. The respondent had to take the further step of obtaining leave of court to issue a writ of possession to enforce the order as required by s 7(1) of the SRA and O 45 r 3(1)(a) and 3(2) of the ROC. The words 'an action in the Court' found in s 234(2) of the NLC did not exempt the respondent from complying with O 45 r 3 (1)(a) and 3(2) of the ROC (see paras 25 & 28).

[Bahasa Malaysia summary

Responden telah memperolehi penghakiman ingkar di mahkamah sesyen terhadap perayu untuk tunggakan sewa yang terhutang berkaitan rumah bersama dengan perintah milikan kosong hartanah. Responden sepatutnya menguatkuasakan perintah untuk milikan kosong dengan memohon writ milikan seperti yang dikehendaki oleh s 7(1) Akta Relief Spesifik 1950 ('ARS') dibaca bersama A 45 k 3(1)(a) dan 3(2) Kaedah-Kaedah Mahkamah 2012 ('KKM'), tetapi sebaliknya, mendakwa untuk bertindak berikutan s 234(2) Kanun Tanah Negara ('KTN'), memasuki semula premis tersebut tanpa writ milikan. Perayu memfailkan tindakan di Mahkamah Tinggi untuk mencabar kesahan tindakan responden dan memohon bahawa jika mahkamah mendapati memihak kepadanya, responden sepatutnya dengan segera memulangkan kesemua harta alih dan dokumen yang diambil oleh responden daripada rumah tersebut. Responden memfailkan permohonan A 14A di bawah KKM memohon kepada mahkamah untuk mendengar secara ringkas tindakan tersebut dengan memutuskan atas perkara undang-undang sama ada cara responden mengambil semula milikan adalah sah. Mahkamah memerintahkan memihak kepada responden dan menolak tuntutan perayu, mengakibatkan rayuan ini. Mahkamah mentafsirkan perkataan-perkataan dalam A 45 k 3(1) KKM yang menyatakan bahawa 'a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means; (a) a writ of possession; (b) in a case in which r 5 applies, an order of committal', bermaksud responden hanya dapat memilih sama ada untuk menguatkuasakan perintah untuk milikan di bawah A 45 k 3 KKM atau dengan cara lain. Mahkamah memutuskan bahawa pilihan responden untuk

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meneruskan di bawah s 234(2) KTN dengan memasuki semula premis tersebut adalah tidak salah kerana A 45 k 3 KKM tidak membuatkannya mandatori untuk responden menguatkuasakan perintah melalui writ milikan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Memandangkan responden memperolehi perintah untuk milikan kosong, dia adalah 'a person entitled to the possession of specific immovable property' di bawah s 7(1) ARS dan adalah mandatori ke atasnya untuk 'recover it in the manner prescribed by the law relating to civil procedure' seperti yang diperuntukkan di dalam seksyen tersebut. Undang-undang berkaitan prosedur sivil adalah A 45 k 3(1)(a) dan 3(2) KKM (lihat perenggan 19, 20 & 23).

(2) Seksyen 234(2) KTN memperuntukkan bahawa pelucuthakan terhadap sub-pajakan apa-apa pajakan, atau penyewaan boleh dikuatkuasakan sama ada 'by re-entry onto the land' atau 'by action in the Court'. Dalam kes ini, pelucuthakan oleh responden dikuatkuasakan melalui 'an action in the Court' memandangkan dia telah memperolehi perintah untuk milikan kosong daripada mahkamah sesyen. Memperolehi perintah adalah langkah pertama untuk menguatkuasakan haknya kepada milikan. Responden terpaksa mengambil langkah lanjut untuk memperolehi izin mahkamah untuk mengeluarkan writ milikan untuk menguatkuasakan perintah tersebut seperti yang dikehendaki oleh s 7(1) ARS dan A 45 k 3(1)(a) dan 3(2) KKM. Perkataan-perkataan 'an action in the Court' yang terdapat di dalam s 234(2) KTN tidak mengecualikan responden daripada mematuhi A 45 k 3 (1)(a) dan 3(2) KKM (lihat perenggan 25 & 28).]

Legislation referred to

National Land Code s 234, 234(1), (2)
Rules of Court 2012 O 14A, O 45 r 3, O 45 r 3(1)(a), 3(2)
Specific Relief Act 1950 s 7(1)

Appeal from: Civil Suit No 22NCVC-306–03 of 2012 (High Court, Kuala Lumpur)

Vincent Tey Wei Seng (Jublin Tan & Tey) for the appellant.
Yau Lap Ho (Yau Lap Ho & Co) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This appeal is against the decision of the High Court Judge of Kuala Lumpur (Civil Division) on a point of law raised by the respondent/defendant by way of an O 14A application (O 14A of the Rules of Court 2012).

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[2] The learned High Court judge had, on the point of law raised, ruled in favour of the respondent/defendant and, accordingly, had dismissed the appellant's/plaintiff's claim against the defendant.

[3] The issue of law posed to the learned High Court judge in the O 14A application is whether the landlord/defendant (the respondent in this appeal), having obtained an order from the sessions court for the payment of rentals and vacant possession against the tenant/plaintiff (the appellant in this appeal), the landlord/defendant, may, thereafter, enforce the order by entry into the tenanted premises (the house) without a writ of possession issued under O 45 r 3(1)(a) and 3(2) of the Rules of Court 2012.

[4] If the answer by the court is in the affirmative, then the court may proceed to dismiss the appellant's/plaintiff's claim.

[5] On the other hand, if the answer is 'No', then, judgment must be entered in favour of the appellant/plaintiff as prayed.

[6] The High Court answered the question in the affirmative. Hence, the present appeal.

[7] The reason given by the learned High Court judge is as follows:

> Court's interpretation of the legal provisions
>
> There are various ways for the defendant, as owner of the premises, to enforce the judgment in order to recover possession of the premises. Should the defendant elect to enforce the judgment for possession of immovable property under O 45 r 3 of the ROC, then the defendant is required to obtain the leave of the court first, followed by the issue of the writ of possession?
>
> O 45 r 3(1) states that a judgment or order for the giving of possession of immovable property 'may be enforced by one or more of the following means' namely, a writ of possession, or in the case in which r 5 applies, an order of committal. It must be noted that the word used is 'may' and not 'shall'. This means that there may be more than the one or two ways provided in O 45 r 3(1)(a) and (b) of the ROC for the defendant to enforce the judgment for possession of his immovable property. It is therefore open to the defendant to elect whether to enforce the judgment under O 45 r 3 of the ROC or by other means.
>
> In this case, the defendant elected not to apply for a Writ of Possession under O 45 r 3 of the ROC. Instead, he elected to proceed under s 234(2) of the NLC, when the plaintiff, as tenant, had breached the provisions of the tenancy agreement by not paying rental or arrears of rental to the defendant as owner and landlord of the premises, by re-entry onto the land ie under the first limb of the said s 234(2), and not by action in court.
>
> As stated in s 234(2) of the NLC, the defendant's re-entry onto the land is subject

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to the provision of any other written law for the time being in force. In this case, the other written laws which are relevant are the ROC and the SRA. O 45 r 3 of the ROC, as I had stated earlier, does not make it mandatory for the defendant to enforce the judgment under that provision and to obtain a writ of possession.

[8] On 19 February 2013, we have allowed the appellant's appeal with costs.

[9] We shall now give our grounds.

[10] From now onwards, we shall be referring to the appellant as 'the plaintiff', and to the respondent as 'the defendant'.

[11] We shall begin with the essential facts of the case.

[12] The defendant is the owner of a house at Taman Desa, Segambut. He rented out the house to the plaintiff under a tenancy agreement dated 19 April 2010. The period of the tenancy agreement is two years. The rental is RM750 per month. The plaintiff had been defaulting in the payments of the monthly rentals for several months since 1 January 2011; and continued to default despite the defendant's solicitor having issued her with a notice of demand dated 25 February 2011.

[13] The defendant, thereafter, took out an action in the sessions court to recover the arrears of rentals as well as to recover vacant possession of the house. As at the date of the filing of the summons, the amount of rentals remain outstanding was RM3,750.

[14] The defendant succeeded in obtaining a default judgment against the plaintiff on 13 September 2011. The default judgment reads:

PAPA 13 SEPTEMBER 2011

DALAM MAHKAMAH TERBUKA

PENGHAKIMAN

TINDAKAN ITU setelah dipanggil untuk sebutan di hadapan Puan Surita Binti Budin, Hakim Mahkamah Sesyen Kuala Lumpur, dalam kehadiran Encik Yau Lap Ho, peguamcara bagi pihak plaintiff dan defendan tidak hadir walaupun Saman dan Pernyataan Tuntutan telah disampaikan dengan sempurnanya.

MAKA ADALAH PAPA HARI INI DIHAKIMI SECARA PENGHAKIMAN INGKAR defendan dikehendaki membayar kepada plaintif jumlah sewa tertunggak yang sebanyak RM6,750.00 (Ringgit Malaysia: Enam Ribu Tujuh Ratus Lima Puluh) sahaja dan faedah pada kadar 8% setahun ke atas jumlah RM6,750.00 dari 1 Januari 2011 sehingga penyelesaian penuh dan milikan kosong Premis tersebut dikembalikan kepada plaintif dan kos tindakan sebanyak

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RM408.00 (Ringgit Malaysia: Empat Ratus Lapan) sahaja.

Bertarikh pada 13 September 2011

t.t.

NUR FARIDATUL AKMAR BT ARIFFIN

Pendaftar

Mahkamah Sesyen

Kuala Lumpur

[15] Thereafter, armed with this default judgment, the defendant re-entered the house and took possession of the same from the plaintiff.

[16] In taking possession of the house pursuant to the court's order, the defendant did not apply for a writ of possession as required by s 7(1) of the Specific Relief Act 1950 ('the SLA') read with O 45 r 3(1)(a) and r 3(2) of the Rules of Court 2012.

[17] The plaintiff protested.

[18] The plaintiff thus commenced the present action seeking a declaration to challenge the legality of the defendant's action in taking possession of the house without a writ of possession pursuant to O 45 r 3(1)(a) and 3(2) of the Rules of Court 2012 and in contravention of s 7(1) of the SLA. There is also the further prayer in the plaintiff's statement of claim that, in the event the court were to rule that the taking of possession of the house by the defendant was unlawful, the defendant was to restore to the plaintiff within seven days all moveable properties and documents of the plaintiff that were taken by the defendant from the house.

[19] On 10 September 2012 the defendant filed the O 14A application. In our judgment, in the present case, since the defendant had obtained an order for vacant possession, therefore, s 7(1) of the SLA and O 45 r 3(1)(a) and 3(2) shall apply if he wishes to enforce the court's order for vacant possession. The law is clear.

[20] Section 7(1) of the SLA which states:

7 Recovery of specific immovable property.

(1) Subject to subsection (2), a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure.

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[21] In the present case, the defendant has obtained an order for vacant possession from the sessions court. Thus for the purpose of the above provision he is:

> a person entitled to the possession of specific immovable property.

[22] Thus, it is mandatory for him to recover the property:

> in the manner prescribed by the law relating to civil procedure.

[23] Now, on the law relating to civil procedure, O 45 r 3(1)(a) and 3(2) of the Rules of Court stipulate:

> Enforcement of judgment for possession of immovable property (O. 45 r. 3)
>
> 3(1) Subject to these rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means;
>
> (a) a writ of possession;
>
> (b) in a case in which rule 5 applies, an order of committal.
>
> (2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without leave of the Court except where the judgment or order was given or made in a charge action to which Order 83 applies.

[24] We are, of course, mindful of s 234(1) of the National Land Code ('the NLC') that was relied upon by the defendant to contend that compliance with s 7(1) of the SRA and O 45 r 3(1)(a) and 3(2) is not mandatory in order to enforce the sessions court order. Section 234(1) of the NLC provides:

> 234 Power of forfeiture.
>
> (1) Every lease, sub-lease or tenancy exempt from registration, whether granted before or after the commencement of this Act, shall, subject to any express provision therein to the contrary, be liable to forfeiture if the lessee, sub-lessee or tenant for the time being —
>
> (a) breaches any of the provisions thereof, expressed or implied;
>
> (b) is adjudicated bankrupt; or
>
> (c) being a company, goes into liquidation.
>
> (2) The forfeiture of any lease, sub-lease or tenancy may be enforced by the person or body for the time being entitled to the reversion thereon either by re-entry onto the land or by action in the Court, but subject in the former case to the provisions of any written law for the time being in force.

[25] It is to be observed that s 234(2) of the NLC envisages two situations, namely:

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(a) the 'by re-entry onto the land' situation; and

(b) the 'by action in the Court' situation.

[26] With respect, we are not persuaded by the defendant's argument that by reason of s 234 of the NLC above, compliance with s 7(1) of the SRA and O 45 r 3 is not mandatory.

[27] In the present case, we accept that this is a case of 'forfeiture' by the defendant/landlord, a person entitled to the reversion in respect of the property in question. But, then, what was the course of action that the defendant, as the owner of the property, had taken to enforce the forfeiture (we have to be careful to note here that, unlike O 45 r 3, s 234 of the NLC speaks of enforcement of 'forfeiture' and not the enforcement of a judgment or order)? Was the enforcement of the forfeiture by way of a 're-entry' onto the property? Or, was it by way of 'an action in the Court'?

[28] We are of the view that, in the present case, the forfeiture was enforced by the defendant by way of 'an action in the Court'. This is because the defendant had taken the trouble to obtain an order for vacant possession from the sessions court. However, the way that we view the matter, the defendant, having obtained an order for vacant possession, has only taken the first step towards enforcing his right to possession of the house: he has to take the further step of obtaining leave of the court for the issuance of a writ of possession in order to enforce the judgment, as required by s 7(1) of the SRA and O 45 r 3(1)(a) and 3(2) of the Rules of Court 2012. In our judgment, the words 'an action in the Court' as found in s 234(2) of the NLC do not exempt the defendant from compliance with O 45 r 3(1)(a) and 3(2).

[29] Accordingly, judgment is to be entered in favour of the plaintiff as prayed.

[30] Appeal allowed with costs.

Appeal allowed with costs.

Reported by Ashok Kumar